that Court is bound by its own decisions — see *Young v. Bristol Aeroplane Company Limited*[11] at page 169 :—

"One of the conclusions reached in the judgment of the Master of the Rolls, with which I agree, is that if the Court of Appeal, when sitting in one of its divisions, has in a previous case pronounced on a point of law which necessarily covers a later case coming before the Court, the previous decision must be followed (unless, of course, it was given per incuriam, or unless the House of Lords has in the meantime decided that the law is otherwise), and that this application of the rules governing the use of precedents binds the full Court of Appeal no less than a division of the Court as usually constituted."

In the face of that clear decision, which has set a matter at rest on which there had been doubts for a long period of time, there is no doubt that this Court, in view of section 16(ii) of the Federated Malay States Courts Enactment, is bound by its own decisions, and therefore we are bound by the previous decision of this Court in the case of *Butler-Madden v. Krishnasamy & others* (*supra*).

Even if this Court was at liberty to refuse to follow its own decision, I should still follow the decision in the case of *Butler-Madden v. Krishnasamy & others* (*supra*) because I agree with it. It is clear from sections 18 and 20 of the Federated Malay States Courts Enactment that the notice of appeal must be filed, and the required deposit made, within the statutory period prescribed by section 18. Both these acts must be done within the prescribed time; the filing of the notice of appeal alone in time is not sufficient. As to that, the case of *In re Dallemeyer*[12] is in point. That was a decision on Bankruptcy Rules 130 and 131 — see *Williams* on Bankruptcy, 15th edition, pages 576 and 577. That case decided that the serving of a notice of appeal within the time prescribed by the Rules, without making the required deposit of security for costs within the same prescribed time, is not sufficient — both acts must be done. It is true that the Court of Appeal in hat case granted an extension of time in which to make the deposit, but that was mainly on the ground that the bankrupt had not been able to find the money to put up the required deposit within the time prescribed.

In the case before us the applicant relies on the affidavit filed by his Advocate and Solicitor; paragaphs 5, 6 and 7 of that affidavit read :—

"5. The said Notice of Appeal was served on the Defendant-Respondent on the 17th day of September, 1948.

6. In getting the Notice of Appeal filed and served I had instructed my clerk, Yap Phooi Fong, to obtain from the client a cheque for the deposit and attend to all other formalities in filing and serving the same.

7. On or about the 9th day of October, 1948, I was preparing to argue the application for stay of execution, and on looking through my papers discovered that there was no receipt for the deposit of $100 in Court that should have been made. I thereupon made enquiries of my clerk at his house, as he had been ill for some time and not attending office, and I found for the first time on Sunday the 10th October, 1948, that the deposit had been omitted to be made."

If those facts are viewed in the light most favourable to the appellant, they indicate a mistake on the part of the clerk of the legal adviser for the appellant, and on the authority of *In re Helsby* (*supra*) such a mistake does not constitute grounds for granting special leave to extend the time in which to appeal.

In my view, however, the facts disclosed in those paragraphs of the affidavit indicate that neither the clerk nor the applicant used sufficient diligence to ensure the appeal being brought in time.

Therefore, even if I did not consider this Court bound by the decision in the case of *Butler-Madden v. Krishnasamy and others* (*supra*), I would not have granted the application to extend the time. Accordingly this application must be dismissed with costs.

Russell, J. : — I have had the advantage of reading the judgment of the learned President. I agree with it and do not wish to add anything.

Briggs, J. : — I have had the advantage of reading the judgment of the learned Chief Justice. I agree with it and have nothing to add.

Application dismissed.

AWANG BIN OMAR v. HAJI OMAR BIN ISMAIL & ANOTHER.

[Orig. Civil Juris. (Laville, J.) January 13, 1949]
[Johore — Civil Suit No. 5 of 1947]

Contract — Defence of non est factum — False representation.

In this case the plaintiff sued the defendants for damages for breach of contract. It appeared that the first defendant, who did not know English, was induced by the second defendant, his brother, to sign the document containing the contract, on the understanding that it was a matter of witnessing his brother's signature.

Held, that on the facts the defence of non est factum was open to the first defendant and the first defendant could not be held liable on the Contract.

Cases referred to :—

(1) *Foster v. Mackinnon* (1869) L.R. 4 C.P. 704.
(2) *Thoroughgood's Case* (1582), 2 Co. Rep. 9a.
(3) *Lewis v. Clay* (1898) 67 L.J.Q.B. 224.

CIVIL SUIT.

M. B. Brash for the plaintiff.

Defendants in person.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Laville, J. : — On 23rd July, 1947, Awang bin Omar of Mersing sued one Haji Omar bin Ismail of Kemaman Trengganu for damages for breach of a contract made between himself and Muda bin Ismail, the brother of Omar, the performance of which had been guaranteed by the said Haji Omar.

The contract was dated 19th June, 1946, and by it Muda agreed to hire Awang's motor boat from that date at $1,000 per month till 31st December, 1946; the value of the boat was fixed at $10,000 and it was agreed that Muda was to hand it back in good order at the expiry of the agreement. Apart from section 18 the other clauses of the contract are not in dispute.

By the contract Haji Omar was made a party and designated as guarantor, but section 18 of the contract which reads as follows :—

> The guarantor binds himself equally with all liabilities of the Hirer

made it clear that Haji Omar was not a mere guarantor but a joint contractor with Muda.

Haji Omar failed to file a statement of defence in time and, on an application by plaintiff to enter final judgment, applied for extension of time to file a defence. This application was granted and a defence was filed on 4th December, 1947, and application made to join Muda bin Ismail as defendant. This application also was allowed and an amended plaint was filed by plaintiff Awang and served on defendant Haji Omar. Service of the plaint was effected on 2nd defendant also, but he entered no defence.

A statement of defence to amended plaint was filed by Haji Omar on 14th April, 1948. This defence was to the effect that Haji Omar did not sign the agreement as a guarantor.

The case came on for hearing on 28th and 30th December, 1948. The 2nd defendant Muda, though he had filed no defence, contested the claim in person as also did Haji Omar. The plaintiff briefed Messrs. Allen & Gledhill, but defendants were not represented by counsel.

The evidence for the plaintiff was the contract itself. He gave evidence that it was signed by himself, Muda and Haji Omar in each other's presence and also in the presence of Abdul Hamid bin Abbas, who witnessed his signature and that of Muda, and in the presence of Ahmad bin Ninam Shah who witnessed the signature of Haji Omar. The contract was drawn by a petition writer, Ghulam Gelani, and read out by him to the parties before they signed it. Ahmad bin Ninam Shah acknowledges his signature on the contract and supports Awang's story that all 3 parties signed together after having the document read to them in Malay. In cross-examination he denied Haji Omar's allegation that he, Haji Omar, was not present at all at the signing, but actually signed it in a bus. He admitted that he then was an employee of the plaintiff and went with Muda, 2nd defendant, to Trengganu in the boat after the deal was concluded.

Abdul Hamid bin Abbas acknowledges his signature as a witness to the signatures of both plaintiff and 2nd defendant and says all the parties to the agreement, including 1st defendant, signed in each other's and his presence at the petition writer's. He makes no mention of Ahmad being present there as a witness to 1st defendant's signature.

The defence evidence was given as follows :—

Haji Omar, 1st defendant, agrees he signed the document A, but says his brother, defendant No. 2, brought it to him to sign in a bus and, on being told by Haji Omar that he did not understand English, assured Haji Omar that there was nothing in it and he was only to sign as a witness. Omar asked Muda, defendant No. 2, to sign and then asked where he was to put his signature and was shown the place by defendant No. 2 and attached his signature there. It then bore no other signatures. He explains his allegation of compulsion on him by plaintiff and defendant No. 2 in his original affidavit of defence as being compulsion by fraud and misrepresentation.

Muda, defendant No. 2, agreed that he was liable under the contract A. He denies he sent for his brother on 19th June, 1946, to come to Kuantan but met him there by chance, though he agrees that the typed contract contained the word "signed sealed and delivered by the said Omar" before he met Omar. He agrees that when he presented Omar with Ex. A. it bore no one's signature at all and he signed first and then Omar and agrees that he asked Omar to sign as a witness. He says he then took the contract back to petition writer Ghulam Gelani and showed him the signatures and the latter said they were in order but the document was not yet completed. He denies that plaintiff and the two witnesses signed in his presence at all, but says he got the contract back from plaintiff duly signed and witnessed and he agrees that when contract was drawn up Hamid was present.

1st defendant called as his witness Ghulam Gelani, the petition writer who drew up the contract A. He agrees with 2nd defendant that 1st defendant was not present when the contract was drawn up. He also agrees that 2nd defendant brought him back the contract signed only by himself (2nd defendant) and

his brother Omar. He says plaintiff wanted a guarantor and 2nd defendant suggested his brother Omar and said Omar would be equally liable with himself, and plaintiff accepted the suggestion of name and liability.

It is clear that there is a conflict of evidence as to the facts attending the signature of 1st defendant on contract A. Plaintiff's 2 witnesses say they saw Omar sign, and Ahmad says he witnessed Omar's signature. It is to be observed that Omar's signature is witnessed by Ahmad and not by Abdul Hamid. There seems to be no reason why the same man should not have witnessed all three signatures if they were made together, and it is difficult to accept plaintiff's explanation. Ghulam Gelani was not cross-examined on this point and further his evidence is that he offered to witness the signatures of all the parties after drawing up the contract, but plaintiff and 2nd defendant refused as 1st defendant was not there and 2nd defendant took away the contract.

In my opinion the most reliable witness as to the drawing up and signing of the contract is Ghulam Gelani, the petition writer who drew it up. He gave his evidence convincingly and, as far as I could see, without bias. He was attacked by plaintiff because, though he had been advising defendant No. 1 in this case from November, 1947, he wrote in August, 1948, to plaintiff's solicitors and offered to give evidence for the plaintiff, but if his letter, Ex. 3, is examined it will be seem that he made no such offer but says if he is required to give evidence as the drafter of the contract he would like to be informed for reasons personal to himself when the case was coming on. In my opinion there is no reason to think that he was selling his evidence, but was enquiring from plaintiff, with whom the conduct of the case lay, how long he might have to delay his departure.

The evidence of Ghulam Gelani supports the story of defendant No. 1 that he, the latter, was not present when the terms of the agreement were discussed between plaintiff and 2nd defendant, and also that 1st defendant's signature was not witnessed by Ahmad when it was made.

I reject the evidence of plaintiff and his two witnesses as to the signing of the contract by the parties. In my opinion the evidence of Ghulam Gelani, a completely disinterested person, is the touchstone by which the evidence of the interested parties must be measured. The evidence of 1st and 2nd defendants is supported by this evidence as regards the issue as to whether 1st defendant was present when the terms were discussed between plaintiff and 2nd defendant and as to whether all parties signed in each other's presence or separately, and as to whether the witnesses to the signatures were present when they were made.

On the basis of this evidence and that of 1st and 2nd defendants, it is clear that there was at no time any privity of contract between plaintiff and 1st defendant, and that 2nd defendant misrepresented to his brother, the 1st defendant, who knew no English what the nature of the document he was signing was and the capacity in which he, 1st defendant, was to sign it and so obtained his signature by false pretences; it would appear that having so done he thus enticed the plaintiff into putting his signature thereto, knowing well that plaintiff would not do so unless he was assured that defendant No. 1 had signed as a party.

The 2nd defendant was acting in this matter as an agent for plaintiff to obtain his (2nd defendant's) brother's consent to be equally liable with himself on the contract and get him to sign it for that purpose. To effect this he deceived his brother as to the nature of the document he was to sign, and, in so far as he was acting as an agent for plaintiff, plaintiff is liable for his acts and cannot evade the responsibility for them.

That being so, I am of opinion that the defence of *non est factum* as defenced in *Chitty* on Contracts 20th Edition Appendix is open to the 1st defendant in this case. It was held in *Foster v. Mackinnon*[1] by Byles, J., on the basis of *Thoroughgood's Case*[2] that where a signatory to a document signs it under a genuine mistake as to its nature he is not bound by the terms of it because his mind has not gone with his action, and *a fortiori* the same reasoning applies when he is deceived into signing it by a false representation as to its nature.

The case of *Lewis v. Clay*[3] was decided on the same principle and it was there held that misplaced confidence in the person who obtains the signature by false pretences does not amount to such negligence as would negative the defence of *non est factum*.

The facts in this case are very similar. Owing to a misplaced but natural confidence in his brother's allegation as to the nature of the document he was to sign, and the fact that he could not read English, 1st defendant was induced to sign this contract thinking it was a matter of witnessing his brother's signature. In his mind therefore he was assuming no liability and making no bargain with plaintiff at all. He cannot therefore be held liable by the plaintiff on the contract

which he was so induced to sign, and the claim against him must fail.

The 2nd defendant does not dispute liability for breach of the contract he has signed, and it simply remains to assess what reparation is due by him to plaintiff.

He admits failure to pay all save one instalment of the monthly hire and is therefore liable on that account for balance of rent up to expiry of contract amounting to $5,366. The motor boat is now and has been since March 1947 out of the jurisdiction of the Court of the Federation in Siam and is in pledge there and must therefore be considered a total loss, and plaintiff is entitled to its full agreed value of $10,000. The 2nd defendant admits that he had the use of this boat in Siam and lived in it till some time in March, 1947, and plaintiff is therefore entitled to hire for that period, i.e. 3 months of 1947, at $1,000 p.m., i.e. $3.000/-.

Judgment will be entered for defendant No. 1 with his costs to be taxed by the Registrar as far as the claim against him goes.

As to the claim against the 2nd defendant, there will the judgment for the plaintiff for $18,366 and costs as incurred in regard to the plaintiff's case against him.

Claim against 1st defendant dismissed. Judgment for plaintiff against 2nd defendant.

MOHAMED SAAD BIN MOHAMED NOR v. HASNAH BINTE ADAM.

[Rev. Civ. Juris. (Callow, J.) January 6, 1949]

[Malacca — Originating Motion No. 8 of 1948]

Mohammedan Ordinance ss. 20, 22 and 29 — Mohammedan Law — Jurisdiction of Magistrate — Application for Maintenance — Order of nusus — Minor Offences Ordinance 37 — Civil or Criminal Proceedings — Revision — Courts Ordinance (Cap. 10) s. 19.

In this case the parties had appeared before the Kathi of Malacca who inquired into the matter and eventually declared the wife (respondent) nusus under section 20 of the Mohammedan Ordinance. Subsequently the wife (respondent) applied for maintenance to the Magistrate's Court. The learned Magistrate held that as the Kathi had made no order as to maintenance therefore he (the Magistrate) had jurisdiction to hear the wife's claim in accordance with section 37 of the Minor Offences Ordinance. The learned Magistrate ordered the husband to pay maintenance. The husband applied to the High Court to have the proceedings set aside on the ground that the decision was wrong in law.

Held, (1) that the institution of the claim for maintenance in the Magistrate's Court after the Kathi had expressly found the respondent nusus and therefore disentitled to any maintenance was an abuse of process; (2) that therefore the order for maintenance must be set aside.

Cases referred to:—

(1) *Chew Cheng Swee v. Chan Chye Neo* (1932) M.L.J. 5.

(2) *Kok Hung Chow v. Lay Mee Yin* (1948) M.L.J. 157.

ORIGINATING MOTION.

S. Shanmugan for the applicant.

Respondent in person.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Callow, J. : — This is an application for an Order in exercise of the powers contained in section 19 of the Courts Ordinance (Cap. 10) that the proceedings in the Court of the Magistrate, Malacca, between Hasnah binte Adam (hereinafter called the respondent) and Mohamed Saad bin Mohamed Nor (hereinafter called the applicant) be set aside on the grounds that the decision is wrong in law.

I should state in the first place that I was exercised whether in view of section 19 of the Courts Ordinance (Cap. 10) this Court could consider the application in view of the amount involved, the total being far in excess of the one hundred dollars. It is clear by the case of *Chew Cheng Swee v. Chan Chye Neo*[1] that the proceedings are civil and not criminal, despite being taken under the Minor Offences Ordinance; and by *Kok Hung Chow v. Lay Mee Yin*[2] which though a Federation case I follow, proceedings in revision may be held.

The facts are that the parties married according to Mohammedan law on the 1st of April, 1945, but after a few months they separated, the respondent returning to her parent's house and refusing to live again with her husband the applicant.

On the 18th of November, 1945, and the 14th of September, 1947, the parties were before the Kathi of Malacca who by virtue of his powers contained in Part II of the Mohammedan Ordinance (Cap. 57) inquired into their matrimonial discord, and eventually declared the wife (respondent) *nusus* (section 20 of the Mohammedan Ordinance). This word is a Malay variation of *nashizah* (*Baillie* page 438: *Wilson*, 5th edition page 124) or *neshuz*, (the *Minhaj*, index and page 318) all meaning recalcitrancy.